



REPUBLIC OF KENYA



**In re Estate of Thomas Kisenga Katumo (Deceased) (Succession Cause
170 of 2011) [2024] KEHC 6596 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 170 OF 2011**

MW MUIGAI, J

MAY 21, 2024

BETWEEN

COUNTY GOVERNMENT OF MAKUENI APPLICANT

AND

ESTHER MUKULU KISENGA 1ST PETITIONER

BENJAMIN MAILU KISENGA 2ND PETITIONER

AND

HENRY MULI KISENGA 1ST PROTESTOR

JAMES MUSAU KISENGA 2ND PROTESTOR

JACKSON MASAVU KISENGA 3RD PROTESTOR

RULING

1. Vide a petition received on 2nd March, 2011 in which the petitioner Henry Muli Kisenga petitioned this Honorable Court for a grant of Letters of Administration Intestate of the estate of Thomas Kisenga Katumo (deceased) who died on 21st September, 1993 as per death certificate and domiciled in Kenya.
2. Pursuant to the Affidavit in support of the said Petition for Letters of Administration Intestate and the Chief's letter of 2/5/2011 from Kitaingo Location, the deceased died intestate and left the following surviving him; -
 - a. Grace Wayua Kisenga Wife-deceased
 - b. Esther Mukulu Kisenga Daughter- Adult
 - c. James Musau Kisenga-son Adult
 - d. Benjamin Mailu Kisenga- Son Adult



- e. Jackson Masavu Kisenga-son Adult
 - f. Mary Syukwaa Kisenga-daughter Adult
 - g. Agnes Kavendi Kisenga-daughter Adult
 - h. Henry Muli Kisenga-son Adult
3. The Affidavit in Support of Petition for Letters of Administration Intestate mentioned properties left by the deceased at the date of his death as follows:
- a. Parcel Nos. 34, 51 and 1696 at Uvete Adjudication Section
The total estimated value of the property is/was Kshs. One million (1,000,000)
4. Vide the Chief's letter dated 22nd February, 2021 confirmed that Thomas Kisenga Katumo (Deceased) hailed from his jurisdiction Kitaingo Location. The chief's letter further confirmed the heirs left as named in the affidavit in support of petition for Letters of Administration Intestate.
5. Vide the Gazette notice dated 5th October, 2012, Henry Muli Kisenga of P.o Box 3898-00506, Nairobi in Kenya the deceased's son was gazetted for grant of Letters of Administration intestate to the estate of Thomas Kisenga Katumo late of Kitaingo who died at Kitaingo.
6. Grant of Letters of Administration granted on 7th November, 2012 and issued on 26th November 2012 by this Court To Henry Muli Kisenga as personal representatives of the deceased's estate to render a just and true account thereof as required by law.
7. Objection to making a Grant was filed on 10/12/2012 by siblings of Administrator on grounds that their consents were not sought/obtained and sole Administrator was not in the best interests of all beneficiaries of deceased's estate
As he was uncooperative with siblings in the administration of the estate.

Summons for Revocation

8. The summons for revocation of grant and supporting Affidavit dated 31st October, 2013 and filed in court on 1st November, 2013 the Applicants, James Musau Kisenga, Benjamin Mailu Kisenga, Jackson Masavu Kisenga and Esther Mukulu Kisenga sought inter alia orders that the grant of Letters of Administration made on the 26th November, 2012, be revoked.
9. The grounds were among others that Henry Kisenga deceased's last born without consents of other siblings or any citation to them obtained grant of letters of administration unknown to them. He failed to disclose that other siblings/persons having equal or prior right to a grant of representation had neither consented or renounced such right and hence sought revocation of the grant.

Replying Affidavit

10. The said application was opposed by a Replying Affidavit dated and filed in court on 14th November, 2013, sworn by Henry Muli Kisenga, the Petitioner herein, wherein he deposed inter alia that the objectors have not met the threshold required for revocation/annulment of grant and they are merely abusing the process of the court.
11. The Respondent deposed that he consulted siblings and they were indifferent and disinterested and only his 2 sisters gave their consents.
12. The matter was canvassed by written submissions.



Court Ruling

13. Vide a court ruling dated and delivered on 24th June, 2014, L.N. Mutende J revoked the Grant of Letters of Administration Intestate issued herein. Parties were directed to seek a further grant.
14. Pursuant to aforementioned ruling, on 9th May, 2019, the Court revoked the grant and then issued the grant of Letters of Administration and issued the same on 9th May, 2019 by this Court to James Musau Kisenga, Benjamin Mailu Kisenga, Jackson Masavu Kisenga as personal representatives of the deceased's estate to render a just and true account thereof as required by law.

Summons for Confirmation of Grant

15. Application for Summons for Confirmation of Grant dated 22nd July, 2019 and file in court on 24th July, 2019, the Applicants sought orders for the grant of Letters of Administration issued on 9th May, 2019 made to James Musau Kisenga, Benjamin Mailu Kisenga, Jackson Masavu Kisenga and Esther Mrulu Kisenga be confirmed.
16. The Summons for Confirmation contained the List of beneficiaries at paragraph 3 and List of Assets that comprise of the estate of the deceased and the proposed mode of distribution that is 7 equal shares in properties;
 - a. Kitaingo/Uvete 35 - 0.41 Ha each beneficiary
 - b. Kitaingo/Uvete 51- 0.34 Ha each beneficiary
 - c. Kitaingo/Uvete 1696- 0.75 Ha each beneficiary

Benjamin Mailu Kisenga attached copy of Sale Agreement dated 2/1/1998 as he bought from his father the deceased 1.46 Ha of Kitaingo/Uvete/35

Esther Mukulu Kisenga was bequeathed 0.69 Ha of Kitaingo/Uvete 1696 as a gift in 1986 as the deceased contemplated his death
17. The aforementioned Summons was opposed by affidavit of Protest dated 3rd December, 2019, sworn by James Musau Kisenga, which affidavit Protest was replied to by the Replying Affidavit of 2nd and 4th Respondents dated 5th June, 2020.

Mediation

- d. Parties herein requested for mediation on 21/9/2020, which request court granted on the said date and fixed mention on 23/11/2020.
- e. Vide a mediation report dated 14th November, 2020, Nancy Wairobi, the mediator herein, in her report stated inter alia that after the private meetings, a joint meeting was held where two of the disputed issues were well discussed. One party made their demands and the other party gave in to the same demand. Surprisingly, the party which had placed the demand retreated back after a member from the other party used abusive language. This aroused anger and outburst which the parties used as an excuse for not entering into an agreement. Both parties requested the matter to be referred back to court.
- f. Court on 23/11/2020 noted that parties did not reach an agreement and directed the matter to proceed to hearing.



Hearing

Petitioner's Hearing

18. PW1 was Esther Mukulu Kisenga. She testified that she wrote the statement with her advocate filed on 11/2/2022 and she wanted the said statement to be her evidence. She told court that she is the first born of Thomas Kisenga Katumo and that her father gave her a gift and wrote it down. She referred to 2nd and 4th Respondent's list of documents of 10/6/2020 No.12, agreement dated 27/12/1986 from Thomas Kisenga (deceased) bequeathing gift land to Esther Mukulu kisenga. She told court that she is still living in the deceased's boma – and/bought some portions of land her father had given her brothers/ his sons during his lifetime.
19. Testifying that in her statement filed on 11/12/2022 at page 2 2nd last paragraph- her brothers. Testifying that she bought from James Musau Kisengo and Jackson Masavu Kisenga sold her Plot Kitaingo/Uveti/51 where she lives. Testifying further that she is next to Henry Muli her brother and the other brothers went far off. Lamenting that Muli is near the parents' home and she is in her parents' home. she told court that they have not distributed the deceased's estate. Further that Henry Muli Kisenga, she brought him up and he does not want PW1 to stay there. testifying that his brothers hide behind Henry Muli Kisenga.
20. PW1 asked the court to give her peace and freedom and her portion of the deceased's estate for her and her family. She told court further that the deceased had a borehole and she took care of it and they interfered PW1 did not know what happened. PW1 want to build and in her statement she stated the prayers as follows;
 - A. Each one who lives on their fathers land they live in peace.
 - B. She wants to have the gift she was given and the rest is divided amongst all the children of the deceased.
21. In cross-examination by Respondent's advocate, it was her testimony that she was given a gift of land and her father did not let her go build there. Testifying that if you are given a gift you can do anything. Further that on 25/12/1986 her father left her land to go and build- that is what the agreement states. She told court that the original Agreement is in the documents of 10/6/2020 marked "SIA 4" IN Kikamba and annexed is the translation of 27/12/1986. She testified that the piece of land she did not live in and built there. the land is a reserved for family care of the parents.
22. She told court that her grandchildren shall build on the land. They are the ones living there. PW1 live on the land where her late father built, at plot 51 and that is where their father lived before he died. Testifying further that 1696 the land her father gave her he did not transfer it to PW1. That she knows Luke Mutuku Muthoka, he lives far off. PW1 did not know if he was sold land. She testified that James Musau and Jackson Musau sold her and she did not know if their land was given during his lifetime.
23. In cross-examination by Jackson Musau, PW1 testified that her father called a meeting due to the fact that they lived in one boma, and that her father wrote the letter of the gift. She told court that in the plot they live all of them each child on the plot at their respective spot. James Musau, Benjamin and PW1 was. Further she is not aware the home only Henry the last born was to remain at home. it was her testimony that her father did not tell her that she would leave as she continued/choose to live or stay there. PW1 was left to there as a daughter that she would go and be married but not go with land. That Jackson had a shamba given by their father and the said Jackson sold PW1 the shamba. According to



PW1, there was no agreement written that he sold her the land and that her father said he would not sell to an outsider. PW1 claimed that she took care of all her siblings.

24. In cross-examination by Mary Syukwaa Kisenga, PW1 testified in court that it is not true that their father called them and that he gave Mary land and PW1's husband Nguli came back the land. Testifying that it is not true the shamba was to live and farm and not for good and the land was for use and gift to take care of the land. That it was a gift it is not for distribution. Maintaining that this was a gift and cannot be for distribution.
25. In cross-examination by Agnes Kavendi Kisenga, Agnes Kavendi told court that PW1 is her sister and she was given a gift and they stand not touch it. That she is not agent of PW1's claim. She asked her brothers to leave out the gift plot 35/51/56
26. re-examination, PW1 testified that she was given land as a gift by her father and he did not tell her to live there. she is the one who helped her brothers and lifted them. PW1 testified that she is living where her father and mother left her.

Protestor's Hearing

27. was Henry Muli Kisenga. He testified that he is the last born son in the family of the late Kisenga Katumo. He is from Kitaingo sub-location Makueni County. That he is a business man and a farmer. PW2 filed Protest of 30/6/2020 at page 11 of the bundle. He asked the court to adopt is as his evidence. Testifying that they filed further affidavit at page 1 of the bundle with annexures which he wished to adopt as his testimony. He told court that he filed witness statement on 16/7/2020 at page 39 of the bundle which he further wished to adopt as his evidence in court. He testified further that he filed a Supplementary Affidavit/Supplementary Witness Statement. He wished to rely on the documents filed and at page 56 of the bundle marked exhibit 1-13.
28. Testifying that he filed Supplementary list of Documents which he wished to produce as exhibits. According to PW2, what is not captured in these statement is the real mood and situation in the family back at home. He told court that there is bad blood, cold war, malice and active fighting for some people to get the largest share of the estate at the expense of others. Testifying that the position he has taken in this matter is where everybody gets equitable share of the deceased estate at the end of the day feel that justice has been done. He told court that for taking that position he has been a victim of malicious prosecution and threats to his wife. He lamented that the genesis of all this is where their eldest sister Esther Mukulu kisenga referred to by his father's that she moves to Plot No. 1696 from where she resides to settle with her family build a house and continue her farming activities there.
29. The document exhibiting this position are of March/December 1986, there is no other problem. That she wants the property given to her as her gift and not to be part of estate. PW2 has refused. Testifying that Esther Mukulu kisenga alleged to have bought a portion of No. 51 plot from Jackson Masavu Kisenga and another piece from James Kisenga and those pieces of land to be excluded from the estate of the deceased.
30. It was his testimony that Benjamin Musau Kisenga alleged to have bought 3.5 acres from plot 35 for 7,000/- PW2 did not agree on that position. PW2 did not think and believe that his father sold land to Benjamin Musau Kisenga.
31. In cross-examination, he testified that his father never left a will as considered under the law. He told court further that there are minutes to a meeting held on 27/12/1986 and not an agreement. Court clerk Geoffrey- explained Kikamba to English at page 61 of the bundle that the deceased gave Mukulu



- Kisenga the piece of land, the elders were present when the deceased was giving his daughter the piece of land and witnessed him (deceased) filling on the beacon (elders are listed).
32. PW2 was present at the meeting and he signed the agreement. Testifying that on 24/4/2022 he said that his father did not give his elder sister a piece of land. PW2 did dispute it is not a gift to his sister and that the meeting of 28/12/1986 was a follow-up meeting. PW2 testified that he lives in his father's compound at Plot 51 and it is not true that he occupies the larger portion of Plot No. 51 and it is still the estate of Mukulu he can substantiate that. Testifying that when his father and mother were ill and they stayed there where he lives as the last born son.
 33. That when Esther Mukulu Kisenga divorced her husband, she came and lived with his parents just with all of them and life started there. testifying that after the death of his parents, Esther Mukulu Kisenga lived at portion of plot 51 in defiance of his late father's direction. Testifying that his father died on 1993. He asked the court to compensate him for his parent's medical bills on the distribution of the estate and that the other children did not help or take care of the parents. He testified that as per Kamba custom the last born child son should inherit the land.
 34. Kisenga Katumo had already directed and he had not called any elder to confirm the Kamba custom of inheritance of land. He called Muthenya Mwatu. Stating that his father directed each of his sons on where they were to build except for Esther Kisenga and these were administrative decisions.
 35. Testifying that where they were told to build on the land it was not written down and they complied. He told court that these is a new property Kitaingo/Uveti/416 which was not included in the estate and that the succession cause was filed on 2011 but in 2016 Governor Kivutha paid for small pieces of land below 10 acres and he came and released the titles, they were released in 2016. PW2 filed it in court on 22/2/2022 because he had to go and consult with his brothers and find out where the land was. PW2 confirmed that Joshua Peter bought it from the person bought from his father.
 36. Testifying that at page 20 he had said Esther Mukulu kisenga has established a shamba permanent dwelling quarters for family. He was not a witness to the fact that his brothers received land. PW2 had a problem with Esther kisenga because she intimidates the family to disinherit them. PW2 proposed that the estate should be divided into 7 equal parts and it shall be equitable and for them all. Testifying that he said Esther should emulate Agnes and moved out of Plot 51. That MHC 231/2011 Esther Kisenga was against him and claimed that he demolished a wall and sought a stay pending the succession cause.
 37. In CMCC 755 of 2017 in Kilungu Court Henry Kisenga was convicted with his son and later he was acquitted by Makeni High Court.
 38. Henry Kisenga was categorical his father did not sell any land Kitaingo/Uvete/35 and there was no Agreement to confirm the same. Benjamin ought to bring the document and witness thereof until then he does not agree on a sale of portion of the land.
 39. Of their own initiative they (the sons of the deceased)got services of a Surveyor and did not sell land but they agreed to sink a borehole and obtained water.
 40. Esther should get her own portion as allotted to her but not to disinherit them. Esther was not given any land and was only shown where to settle her family on 1696.
 41. Protestor's witness Julius Muthenya (PW2) recorded statement and stated that he did not know of property Kitaingo/Uvete/416. He recalled that the deceased called a meeting and his mother attended where Esther Mukulu Kisenga was allowed to live in the homestead as she had nowhere to go after separating from her husband.The deceased later gave her a shamba to build her home and later she refused to move to the land 1696.Esther lived on Plot 51 even as the deceased lived on the land in



1991. He stated it is against Kamba custom for a daughter to reside on father's land both Esther & Henry reside on the same land Plot 51. Christine Ndunge daughter of Esther died and is buried there Plot 51.
42. Joseph Musau Kisenga nephew to the deceased Thomas Kisenga Mutumo he recorded a statement to be adopted as evidence in Court. He took the view that Esther Kisenga ought to move to Plot 1696 where she was allocated by the deceased and leave Plot 51 where she lives to date. In cross examination he admitted that he was not at the meeting when the deceased told Esther Kisenga to go and settle on 1696. Esther lives on Plot 51 and has built her home which she did while the deceased her father was alive. The deceased had told each of the children where to live on the properties. Distribution was only to men under customary law therefore, each of the sons was told/shown where to live.
43. Mary Sukwaa Kisenga d/o the deceased Thomas Kisenga recorded her statement on 16/7/2021 and stated that the daughters of the deceased were not given any share were left out except Esther who was given 1696 to build but not as a gift. She built on both 1696 & 51 and she ought to move from Plot 51 and leave Henry Kisenga to live there.
44. She admitted she attended the meetings where land was allocated and she was not given any land as she is married and was aware of property Kitaingo/Iveti/416. She also was not paid any money for sale of use of the borehole. She was aware that the CDF Committee paid Henry Kisenga for land to sink the borehole Ksh 300,000/- for ¼ to put up Nzaimi Borehole.
- Esther Kisenga built and lived in Plot 51 since 1978 while their parents were alive and their parents did not object or send her away.
45. James Musau Kisenga, 1st born of the family s/o of the deceased Thomas Kisenga admitted that as a family there were fights mainly by Benjamin and they called the clan and Benjamin was taken to Court. They went to the Chief and could not agree. He wanted the properties divided amongst children of the deceased. He confirmed that in 1978, the deceased, their father went to Kalama where their sister was married and brought her, called a meeting and all children/family were present Benjamin refused to attend the meeting where he gave Esther a place to build on 1696. He took a jembe and told him to plant makonge. Henry Mulli was told to build at parents home. Esther built on Plot 51 during deceased's life and was not sent away. He stated that when there was drought he received money from Esther but could not sell land Plot 35 as it belonged to the deceased.
46. Jackson Musau Kisenga; 4th born of the family of deceased Thomas Kisenga who confirmed that they lived on Plot 51 while parents were alive. Later as they grew up the deceased their father shoed them where to build on the properties.
- Their late father showed each of them where to build, James Kisenga 1st born built in Plot 35, Benjamin Mailu Plot 51, Jackson Kisenga Plot 35 Esther Mukulu 1696 Agnes kapendi Plot 51 Henry Mulii Kisenga Plot 51.
47. Esther Mukula has been on Plot 51 since 1970's they all lived together with parents on Plot 51. Esther built her house as she was to repair their mother's house. They could not go against what their father said, Esther Mukulu was given 1696 to settle her family when she left her husband but lived on both properties during their parents lives and they did not object.
48. CMCC 231 of 2011 Esther Mukulu gave them money to testify against Henry Kisenga. Esther KMukulu gave him money and helped him during the famine and he was unable to repay. He did not sell land to her although he was drunk and signed agreement of 1995. He admitted as sons of Kisenga they were paid Ksh 300,000/- for acquisition of Nzaini Water Borehole. He was not part of the



survey as ordered when the matter was heard by Hon.D.K.Kemeij He advocated that Henry kisenga be refunded medical expenses of their parents.

Summons Dated 31.07.2023

49. The applicant filed the summons seeking orders that the County Government, its agents, servants, employees and any other person acting in its authority including contractors and water service providers be and is hereby granted unlimited and uninterrupted access to oversee repair, manage, protect and distribute water at Nzaini borehole situated in a portion of plot No. 1696 UVETE Adjudication Section pending hearing and determination of the application and protest and that cost be in the cause.
50. The application was supported by the affidavit sworn by Dr Justin Kyambi the County Secretary and head of public service County Government of Makueni where he deponed that there was an admission that the portion and infrastructure the subject of this application and protest was fully bought and compensated to the through public funds.
51. He further deponed that the utility in question was a borehole bought financed and implemented by the then Constituency Development Fund (CDF) and by virtue of the *Water Act*, 2016 and the Makueni County *Water Act* 2020, the responsibility, assets and liabilities were taken over by the said county government which provides water to the public
52. That the administrators of the Estate of Thomas Kisenga Katumo received compensation for the land which the borehole is located from public coffers on 2nd February 2012 making the infrastructure wholly public
53. It was deposed that the Nzaini Borehole is a rural water project providing water to the rural folk and the count government of Makueni was desirous of putting measures in place to provide water sustainably to the people of Nzaini and its environs and ensure accountability to the community.
54. The applicant deposed that the application was meritorious and is simply intended at protecting and preserving the public interest.

Replying Affidavit

55. The Replying Affidavit was sworn by the 4th Administrator Henry Muli Kisenga who deposed that he had the authority of his co- administrators.
56. He deposed that the Nzaini borehole is situated in a land known as Kitaingo/ Uvete1696 owned by the deceased Thomas Kisenga and that the parcel was yet to be distributed and there was an active succession case with regard to distribution.
57. It was his position that none of the administrators jointly or individually sold any portion of land on Kitaingo/Uvete 1696 to the County government of Makueni and that the Kilome CDF committee did not purchase the said parcel but only funded the initial drilling costs while other donors including members of the community contributed for the infrastructure development.
58. That since 2005, the successive Kilome CDF Committee and the members of the County Assembly have tried to forcefully get the family to transfer the portion of land through harassment and intimidation using the local administration and police
59. It was averred that on 27th June 2012, the local administration through the office of the then assistant chief attempted to fraudulently transfer the entire parcel of land by coercing a member of the family to signing and affixing his passport photo on the transfer form.



60. It was his position that the family was not opposed to a negotiated settlement of the matter provided its right to unhindered access to the borehole is properly documented and or in the alternative proper and adequate monetary compensation is done as per the rules of compulsory acquisition of the land to the estate of the deceased Thomas Kisenga
61. That the applicant was a stranger to these proceedings as there are neither legal beneficiaries of the estate nor are they the actual proprietors of the borehole in question and that there are devolving interests of the Nziani Borehole water Project which are entrusted to the Kisenga family as stipulated in the form of agreement between Kilome CDF Committee and Kisenga Family
62. It was averred that the applicant had come to court with unclean hands and the application and affidavit of protest was an abuse of court process and should be dismissed with cost.

Petitioners Replying Affidavit

63. Vide a replying affidavit sworn by Benjamin Mailu Kisenga who deponed that the application was misguided and ill advised as his family never sold any portion of land to the County Government of Makueni and that the documentation does not show that there was indeed sale of the borehole from the joint administrators of the estate to the said county government and that the administrators did not have any power in law to deal with the land at that period as alleged and whoever sold land at that period are guilty of intermeddling with the estate as they had not authority to deal.
64. It was averred that the County had no identifiable, legal stake and interest to warrant being enjoined in the proceedings and that the dispute is purely family matter and does not involve public interest.
65. It was averred that the application was only meant to confuse, muddle up issues and delay trial and completion of the cause which has been pending since 2011 and prayed that the court dismisses the summons with costs to the respondent

Further Affidavit

66. was averred by Dr Justin Kyambi who sworn the affidavit on behalf of the county government of Makueni that section 9 of the office of the county attorney Act exempts the county Attorney from filing formal application in matters of public interest and is only required to file a certificate of intention to be enjoined in the proceedings.
67. It was his position that the petitioners were present during the sale of the property and received a total of kshs 300,000 from Nzaani Water Project which was done to rescue the residents of Uvou, Kingalani, Mwanyani Kilia who were in need of clean water.
68. The court was urged to decide the matter on a balance of convenience which ought to be in favour of the poor and helpless residents of the said villages and urged the application be allowed.

Applicant's Submissions

- g. The Applicant filed their submissions dated 5th December 2023 where it was submitted that the issues for determination were whether the applicant ought to file a formal application to be joined in the proceedings, whether there was a sale agreement between the petitioners and the applicant and whether this is a matter of public interest
- h. On the 1st issue reliance was made to section 9 (3) and (4) of the Office of the County Attorney Act and that the applicant filed a certificate of intention to be joined in the proceedings and thus has rightfully been joined



- i. On the 2nd issue, it was submitted that the applicant attached a sale agreement and payment vouchers in its supporting affidavit which agreement shows it was between the Kisenga family and Nziani Borehole self-help group which they signed and received a sum of Kshs 300,000 as compensation
- j. On the issue of whether the matter is a public interest, it was submitted that the project provides clean water to the residents of Uvou, Kingalani, Mwanyani, Kilia, Kitongoni. Kimia, Kathanga, Kwa Kathendu villages, Upete market and Upete Health centre.
- k. Reliance was placed to the case of Dindi Oscar Okumu vs Robert Pavel Oimeke & 5 Others [2021] eKLR and People’s Union for Democratic Rights & Others v Union of India & others on issue of public interest
- l. Reliance was placed in the case of Esther Nugari Gachomo V Equity Bank Limited [2019] eKLR.
- m. They urged the court to rule in favour of the applicant for the benefit of the poor and the helpless people
Petitioners Submissions
- n. Vide the submissions dated 7th November 2023, the petitioner’s submitted that the application was incurably and fatally defective as it does not seek joinder as prayers and does not cite any particular provisions for joinder.
- o. It was submitted that the agreement relied upon by the applicant is no agreement in law in that whereas the agreement was allegedly entered into in 02.02.2012, the grant of letters of administration were issued 7 years later and at that point none of the members of the family had the authority to enter into any arrangement for sale of land belonging to the deceased.
- p. It was submitted that any action by the county government of Makueni would be regarded as intermeddling as they have not demonstrated that they were authorized by any law.
- q. It was submitted that granting the orders sought in the summons would be rubberstamping an illegality
- r. It was submitted that the applicant should not be joined as party to the proceedings because it is not a beneficiary to the deceased estate nor does it have an identifiable stake/ legal interest.
- s. Reliance was made to the case of Skov Estate Limited & 5 others v Agricultural Development Corporation & Another [2015] eKLR and submitted that the applicant interest was not only unlawful and a result of intermeddling but is also very cursory.
- t. It was submitted that the court be pleased to dismiss the applicant’s summons with costs to the petitioners

Analysis and Determination

- 69. I have considered the parties pleadings, the Summons for Confirmation filed on 24/7/2019, the Protests, the oral evidence adduced during the hearing, the Certificate of Urgency of 24/3/2023 filed by the Applicants /Administrators of the estate of the estate against alleged intermeddlers and responses and subsequent application under Certificate of Urgency by County Attorney Makueni County seeking to be joined to the instant proceedings of 7/8/2023 and responses thereto, written



submissions thereto. The pleadings evidence and submissions on record disclose issues that emerge for determination are;

1. Distribution of deceased's estate Thomas Kisenga Katumo to the beneficiaries of the estate based on the Summons for Confirmation of grant and Protests raised and evidence adduced now on record

The *Law of Succession Act* Preamble provides;

An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto

70. The death of deceased sets motion the operation of *Law of Succession Act* in administration and/or distribution of deceased's estate where the deceased died from 1981. In interpreting and applying the Law of Succession the Court is mandated to look at the provisions of the law through the lens of Constitution 2010 particularly Article 27 that outlaws any form of discrimination and instead provides for equality.
71. The Court by virtue of Section 71 of the *Law of Succession Act* shall determine the List of beneficiaries of the estate of the deceased; the assets that comprise of deceased's estate are determined not only by deceased's name on ownership titles/documents but also whether the asset(s) is/are available for distribution in light of proprietary rights claimed by Creditor(s), Purchaser(s) Financial Institution's claim(s), inter vivo gifts, nominations and any other deceased's action or decision during his/her lifetime over the said assets of the deceased's estate.
72. In the instant case, the Beneficiaries of the estate are All listed in the Petition for grant of letters of administration 3 girls and 4 boys. The girls were left out in distribution of the estate as they were married and left home and the deceased at the time before his demise in 1993 had shown each of the sons where to build their house(s) and stay on the spot/area. It is also on record that Esther Mukulu 1st born daughter of the family was married and came back home with children in 1978 and the deceased gifted her Property 1696 the contest is whether she was given absolutely or to build and settle her family. However, during their parents' life time Esther Mukulu built on Plot 51 where the family resided and beneficiaries were brought up on and have moved leaving Henry Kisenga last born son of the family residing on the property.
73. The Court finds that the allegations of sale of land between siblings is not for this Court to determine suffice is that Parcel Nos 35; 51; 1696 & 416 are in the names of the deceased and form part and parcel of his estate.
74. Therefore, the appropriate section of the law applicable to distribution of the estate of the deceased where there is no spouse but children is Section 38 of *Law of Succession Act*; taking into account the deceased had gifted each child or son where to build and occupy the properties and asking the permanent developments be demolished to allow equal distribution is inhuman and unreasonable with adequate compensation, this Court will apply both equal and/or equitable distribution of deceased's estate.
75. The Court in Re Estate of John Musambayi Katumanga – Deceased[2014] eKLR held as follows:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed



to 'equitably'. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

76. This standard of equal distribution demands mathematical precision and in the absence of Surveyor this Court is not aware on the position on the ground to inform equal distribution. Secondly, in the specific circumstances of each case it may not be possible, practical or fair in the circumstances to endorse equal distribution. I am fortified based on the evidence on record to pursue as much as is practically possible equitable distribution in light of prevailing circumstances of the instant matter.

77. On the issue of gifts inter vivos as provided by Section 42 of LSA that previous benefits to be brought into account during the distribution of the deceased's estate shall apply in the instant case. In *Micheni Aphaxard Nyaga & 2 Others Vs Robert Njue & 2 Others* (2021) eKLR, it was observed that

“It is evident that where there is an imperfect gift having regard to the requirements, of the necessity for the same must be by way of written memorandum, registered transfer and or declaration of trust in writing, the gift may nonetheless be perfected by the conduct of the parties.”

78. In *Re Estate of Etete Masakhalia (Deceased)* [2021] eKLR, Hon W. Musyoka J made the following observations on gift inter vivos

(63) Often at distribution, property is placed before the court, registered in the name of the deceased, but claimed by the survivors or beneficiaries, on grounds that the deceased had made lifetime gifts of it to them. This usually happens with respect to land, where the deceased, during lifetime, had shown portions of his land to his children, especially sons, to put up houses, and to till or graze their animals, without transferring title in such property to them. It could also be done with respect to commercial properties, where the deceased permits his children, upon coming of age, to carry on trade from business premises that he owns, again, without conveying title in such property to the children. In most cases when he dies, the children then claim that they had been gifted those assets during the lifetime of the deceased, and argue that the said assets ought not to be made available for distribution to anyone but themselves.,

79. Therefore, the distribution is as follows;

1. Land Parcel 51- the parents homestead to be distributed amongst ALL children of the deceased equally /equitably taking into account not to demolish permanent structures, cultivation areas access and utility as the deceased pointed out to his children to occupy use and develop during his lifetime.
2. Esther Mukulu – will retain the permanent house built on Plot 51 only as she was/is bequeathed gift inter vivos allocated Land Parcel 1696 where she admitted her children reside. The Court finds from evidence on record her father rewarded her for taking care of parents and siblings and did not admonish her not to build or move from the property when she came back home with her children and left her husband and she has been on the plot 51 since 1978.
3. Henry Kisenga shall retain occupy use the parents' home as agreed by family as the last born child /boy of the family.

James Musau Kisenga

Benjamin Mailu Kisenga



Jackson Masavu Kisenga

Mary Syukwaa Kisenga &

Agnes Kavendi Kisenga shall have equal/equitable share of Plot 51.

4. Plot 35- shall be distributed amongst the sons of the deceased equitably or equally. Any alleged sale of any part of the property shall be ventilated before ELC Court by virtue of Section 13 of Environment & *Land Act* & Article 162 of *the Constitution*.
 5. Plot 416- shall be distributed equally or equitably between children of the deceased except Esther Mukulu who was bequeathed Plot 1696.
 6. Plot 1696- wholly to Esther Mukulu as was gifted by deceased and acknowledged by family except the Administrators of the deceased's estate part sold and/or allocated part of the Land used as Water Borehole that is the subject of dispute between CDF Committee Makueni County and Administrators of the estate of the deceased and for now hived off awaiting resolution of the dispute.
2. Whether the County Government of Makueni (CDF) Committee is an interested party that should be enjoined in the proceedings and whether this issue is of public interest.

Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows: -

“The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”

80. The applicant averred that it has stake in the proceedings before court because the property in question was acquired using taxpayers money and the water service provision is a mandate of the county government and as such the applicant has a duty to protect and hold the property in trust for the people of Makueni.
81. The Applicant further relied on section 9 (3) and (4) of the office of the County Attorney Act which provides as long as County Attorney files a certificate of intention to be joined in the proceedings
82. In the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:
 - (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
 - (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
 - (iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions:

- a) what is the intended party's state and relevance in the proceedings
and



b) will the intended interested party suffer any prejudice if denied joinder.?”

83. It is important to then determine whether the Applicant satisfies the criteria for joinder in the proceedings. I find that the applicant has proved that it has stake given that it is not disputed that the property has the Nzaini borehole which provides clean water to the residents of Uvou, Kingalani, Mwanyani, Kilia, Kitonguni, Kimia, Kathanga, Kwa Kathendu villages, Upete Market and Upete health centre
84. In fully adopting the reasoning in the above mentioned cases; I do find that the Applicant has demonstrated on a balance of probabilities that it has a clear and identifiable interest and stake in the present suit and have made relevant submissions to the issue in dispute and further explained how the community benefiting from the borehole is likely to suffer prejudice should the application be denied. I do find that its presence before the court is necessary and are joined to these proceedings.
85. The next issue to determined is if the property was sold to Kilome CDF committee. From the look of the evidence of record there is a sale agreement and payment vouchers which attempt to show that the family of the deceased Thomas Kisenga and Kilome CDF Committee entered into an agreement over the Nzaini Borehole.
86. The court cannot also turn a blind eye to the alleged time of sale of the said portion of property vis a vis the time the grant of letters of administration was granted.

The provisions governing intermeddling in the estate of a deceased person is Section 45 of the [Law of Succession Act](#). This Section is worded:

“No Intermeddling with property of deceased person”. The section provides that:

45. Except so far as expressly authorized by this Act, or by any other written law,
- (1) or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration
87. The part of the estate in occupation and contested herein shall be preserved to await the cause to be lodged over same claim in the next 3 months in the Environment and Land Court. The court is weary of the fact the issues cannot be finally determined at this point due to lack of sufficient evidence and competing legal interests on the same property that is beneficial interest as the property is registered in the deceased’s name at the time of his death and proprietary interest arising out of the dispute between Administrators and interested party CDF Makueni County over Public /Community Borehole.



Probate & Administration Rule 41(3) provides;

Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.

Disposition

88.

1. This Court orders of 24/2/2023 shall continue in operation and bind the disputants, the Administrators who allegedly received monies and did not share with beneficiaries, the beneficiaries and buyers/ occupants of Nziani water Borehole CDF Committee Makueni County and the Community users of the Borehole shall ALL use share and have access to water and borehole pending hearing and determination of the dispute in ELC.
2. Any alleged sale of any part of the property shall be ventilated before ELC Court by virtue of Section 13 of Environment & Land Act & Article 162 of the Constitution.
3. Distribution of the estate of the deceased is as outlined above at Paragraph 79 in Partial Confirmation of Grant save for the hived off part of Suit property 1696 where stands the Community Borehole and is the subject of dispute to be heard and determined by ELC Court.
4. Any aggrieved Party may apply to Court in default; A partial confirmation of grant shall issue on the distribution highlighted above.

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT
ON 21/5/2024 – VIRTUAL/PHYSICAL CONFERENCE.**

M.W.MUIGAI

JUDGE

